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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EFRINE BERSIME CABALLERO, Defendant and Appellant.	B298815 (Los Angeles County Super. Ct. No. TA087353)

APPEAL from an order of the Superior Court of Los Angeles County, Allen Joseph Webster, Jr., Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey,

Acting Senior Assistant Attorney General, Idan Ivri and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), effective January 1, 2019, amended the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder. Under Penal Code section 1170.95,[1] a person who was convicted under theories of felony murder or murder under the natural and probable consequences doctrine, and who could not be convicted of murder following the enactment of SB 1437, may petition the sentencing court to vacate the conviction and resentence on any remaining counts.

A jury convicted appellant Efrine Bersime Caballero of second degree murder in 2007. Following the enactment of SB 1437, appellant filed a petition for resentencing under section 1170.95 and requested the appointment of counsel. The trial court summarily denied appellant's petition, without appointing counsel or permitting briefing, finding appellant was ineligible for relief based on the evidence presented at his trial. On appeal, appellant argues the court erred in relying on matters outside the petition to summarily deny it. He also contends the court's summary denial

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[1] Undesignated statutory references are to the Penal Code.

violated his federal constitutional rights to counsel and due process. Finding no error, we affirm.

BACKGROUND[2]

In 2007, appellant was tried for murder and related offenses. As to the murder charge, the People prosecuted the case on two alternative theories: (1) appellant himself shot and killed the victim; or (2) appellant was a direct aider and abettor in the murder, acting "with knowledge of [the perpetrator's] unlawful purpose" and "intend[ing] [to] encourage murder." The trial court instructed the jury on each of these theories. As to the direct aider and abettor theory, the court instructed under CALCRIM No. 401 that an aider and abettor must "know[] of the perpetrator's unlawful purpose and . . . specifically intend[] to . . . aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." The court did not instruct the jury on felony murder or the natural and probable consequences doctrine.[3]

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[2] We grant respondent's request to take judicial notice of the appellate record in appellant's prior appeal (*People v. Caballero*, (Apr. 21, 2008, B199180) [nonpub. opn.], (*Caballero*).)

[3] Before the Legislature enacted SB 1437, "'[t]he felony-murder rule ma[de] a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state.'" (*People v. Bryant* (2013) 56 Cal.4th 959, 965.) A murder conviction under this rule, "'[did] not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony.'" (*Ibid.*)

(Fn. is continued on the next page.)

As relevant here, the jury found appellant guilty of second degree murder, and he was sentenced to a total term of 26 years to life. We affirmed the judgment of conviction in an unpublished opinion. (*Caballero*, *supra*, (B199180).)

In 2019, appellant filed a propria persona petition for retroactive sentencing relief under section 1170.95, alleging he was convicted of murder under a theory of felony murder or the natural and probable consequences doctrine, and claiming he could not be convicted of that offense following SB 1437's enactment. Appellant requested that the trial court appoint him counsel to represent him in the proceedings. The trial court summarily denied the petition without appointing counsel or permitting briefing. Based on the evidence presented at appellant's trial, the court concluded appellant was the actual shooter and found he

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"Under the natural and probable consequences doctrine, '[a]n aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime.'" (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 433-434, quoting *People v. Smith* (2014) 60 Cal.4th 603, 611.) Prior to SB 1437's enactment, if a person aided and abetted only an intended assault, but a murder resulted, that person could be guilty of murder "'if it [wa]s a natural and probable consequence of the intended assault.'" (*People v. Smith*, *supra*, at 611.) As explained below, SB 1437 limited the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder.

was therefore ineligible for relief under SB 1437. Appellant timely appealed.

DISCUSSION

A. *Governing Principles*

1. *SB 1437's Limitation of Accomplice Liability for Murder*

The Legislature enacted SB 1437 "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f).) SB 1437 amended section 189 to provide that a participant in qualifying felonies during which a death occurs generally will not be liable for murder unless that person was (1) "the actual killer," (2) a direct aider and abettor in first degree murder, or (3) "a major participant in the underlying felony [who] acted with reckless indifference to human life."[4] (§ 189, subd. (e).)

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[4] This limitation does not apply "when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties." (SB 1437, § 189, subd. (f).)

SB 1437 also "added a crucial limitation to section 188's definition of malice for purposes of the crime of murder." (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 326, review granted Mar. 18, 2020, S260493 (*Verdugo*).) Under new section 188, subdivision (a)(3), "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." "As a result, the natural and probable consequences doctrine can no longer be used to support a murder conviction." (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135, review granted Mar. 18, 2020, S260598 (*Lewis*).) "The change did not, however, alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.'" (*Ibid.*) "One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law." (*Ibid.*)

2. *Petitions to Vacate Prior Convictions*

SB 1437 also added section 1170.95 to the Penal Code. This section permits individuals who were convicted of felony murder or murder under a natural and probable consequences theory, and who could not be convicted of murder following SB 1437's changes to section 188 and 189, to petition the sentencing court to vacate the conviction and resentence on any remaining counts. (§ 1170.95, subd. (a).) A petition for relief under section 1170.95 must include: "(A) A declaration by the petitioner that he or she is eligible for

relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1).) If any of this information is missing "and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." (§ 1170.95, subd. (b)(2).)

If the petition contains the required information, section 1170.95, subdivision (c), prescribes "a two-step process" for the court to determine if it should issue an order to show cause. (*Verdugo*, *supra*, 44 Cal.App.5th at 327.) First, the court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) If the petitioner has made this initial prima facie showing, he is then entitled to appointed counsel, if he has requested one. (*Ibid.*; *Verdugo*, *supra*, at 328; *Lewis*, *supra*, 43 Cal.App.5th at 1140.) The prosecutor must file a response, and the petitioner may file a reply. (§ 1170.95, subd. (c).) The court then reviews the petition a second time. If, in light of the parties' briefing, it concludes the petitioner has made a prima facie showing that he or she is entitled to relief, it must issue an order to show cause. (*Ibid.*; *Verdugo*, at 328; *Lewis*, at 1140.)

"Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts." (*Verdugo*, *supra*, 44 Cal.App.5th at 327, citing § 1170.95, subd. (d)(1).) At the hearing, the parties may rely on the record of conviction or present "new or additional evidence" to support their positions. (§ 1170.95, subd. (d)(3).)

B. *Analysis*

Appellant challenges the trial court's summary denial of his petition, without appointing counsel and allowing briefing. His primary contention is that the court erred in looking beyond the face of the petition in conducting its first-step review for prima facie eligibility under section 1170.95. Appellant's claim regarding the procedures section 1170.95 affords raises questions of law subject to de novo review. (See *In re T.B.* (2009) 172 Cal.App.4th 125, 129 [interpretation of statute reviewed de novo].)

Every Court of Appeal to have considered the issue has held that in determining whether a petitioner has met his burden of demonstrating prima facie eligibility, a trial court may look to documents that are part of the record of conviction or are otherwise in the court file. (See *Verdugo*, *supra*, 44 Cal.App.5th at 329 [documents in court file or record of conviction should be available to trial court in connection with first prima facie determination under subd. (c)]; *Lewis*, *supra*, 43 Cal.App.5th at 1138 [trial court may

summarily deny petition without briefing or appointment of counsel if court file shows petitioner was convicted of murder without instruction or argument based on felony-murder rule or natural and probable consequences doctrine]; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57-58, review granted March 18, 2020, S260410 (*Cornelius*) [affirming summary denial of petition based on verdict, trial transcript, and prior appeal].)

In *Verdugo*, the Court of Appeal reasoned that the same material the trial court may evaluate in conducting a facial review for completeness under subdivision (b)(2) of section 1170.95 -- "documents in the court file or otherwise part of the record of conviction that are readily ascertainable" -- should similarly be available to the court in conducting the first-step review of statutory eligibility for relief. (*Verdugo*, *supra*, 44 Cal.App.5th at 329.) In *Lewis*, the court looked to "analogous situations" in which trial courts are tasked with a preliminary evaluation of prima facie eligibility for relief, and noted that trial courts in those settings "are permitted to consider their own files and the record of conviction." (*Lewis*, *supra*, 43 Cal.App.5th at 1137-1138, citing, e.g., *People v. Washington* (2018) 23 Cal.App.5th 948, 953 [courts conducting initial screening of petition for reclassification of qualifying felony convictions under § 1170.18 may review record of conviction] and *In re Serrano* (1995) 10 Cal.4th 447, 456 [trial court may summarily deny habeas corpus petition based on facts in its file]; accord, *Cornelius*, *supra*, 44 Cal.App.5th at 58 [noting

courts may summarily deny petition for writ of *coram nobis* where "'any matter of record'" precludes prima facie showing of eligibility for relief].) The *Lewis* court further explained, "Allowing the trial court to consider its file and the record of conviction is also sound policy": "'It would be a gross misuse of judicial resources to require . . . appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if . . . a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.'" (*Lewis*, *supra*, 43 Cal.App.5th at 1138, quoting Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) ¶ 23:51(H)(1).)

Appellant argues section 1170.95's requirement that a petitioner make only a prima facie showing of eligibility precludes credibility assessments and therefore prevents courts from considering evidence beyond the petition itself. But even on review for prima facie eligibility, where a court's own records contradict a petitioner's claims, the court need not credit those claims. (Cf. *In re Serrano*, *supra*, 10 Cal.4th at 456; *People v. Washington*, *supra*, 23 Cal.App.5th at 953.)

Accordingly, we follow *Verdugo*, *Lewis*, and *Cornelius*, and look to the trial court's file in evaluating appellant's petition.

Appellant's trial record conclusively shows he was ineligible for relief because he had not been convicted of felony murder or murder under a theory of natural and probable consequences.[5] The jury was instructed on the theories that appellant was the actual killer or a direct aider and abettor in the murder. No instruction was given on either felony murder or the natural and probable consequences doctrine. The prosecutor's closing argument was in accord, arguing that appellant either shot and killed the victim himself or aided and abetted the perpetrator, "intend[ing] [to] encourage murder." Appellant was therefore ineligible for relief under section 1170.95, which applies only to those "convicted of felony murder or murder under a natural and probable consequences theory." (§ 1170.95, subd. (a).)

Appellant next argues that the trial court's summary denial of his petition violated his federal constitutional right to counsel under the Sixth Amendment. However, appellant

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[5] Appellant speculates the trial court relied on our opinion in his prior appeal. Even assuming he is correct, we need not decide whether our prior opinion supported the trial court's ruling, as we may affirm the judgment on any correct basis presented by the record. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 139 ["on appeal we are concerned with the correctness of the superior court's determination, not the correctness of its reasoning"].)

had no constitutional right to counsel at this stage of a section 1170.95 proceeding. This provision's retroactive relief reflects an act of lenity by the Legislature and is not subject to Sixth Amendment analysis. (Cf. *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156 [no right to jury trial in proceedings under SB 1437 because its retroactive relief is "an act of lenity that does not implicate defendants' Sixth Amendment rights"], citing *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064; *Pa v. Finley* (1987) 481 U.S. 551, 555 [prisoners have no constitutional right to counsel "when mounting collateral attacks upon their convictions"].) *People v. Rouse* (2016) 245 Cal.App.4th 292 (*Rouse*), on which appellant relies, is distinguishable. There, the Court of Appeal held that a defendant who had successfully petitioned to recall his sentence under section 1170.18 was entitled to counsel at his subsequent plenary resentencing hearing. (*Rouse*, *supra*, at 299-300.) *Rouse* does not support appellant's position that he was entitled to counsel in litigating his eligibility for relief under section 1170.95.

Finally, appellant claims the summary denial of his petition violated his procedural due process rights because it deprived him of procedures to which he was entitled under section 1170.95. As discussed, however, the trial court's summary denial of appellant's petition complied with section 1170.95's procedures. Appellant has therefore suffered no due process violation.

DISPOSITION

The order denying appellant's petition under section 1170.95 is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.